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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ARASH TASHVIGHI, Plaintiff and Respondent, v. RAPID PLUMBING, INC. et al., Defendants and Appellants.	B229037 c/w B235181 (Los Angeles County Super. Ct. Nos. BC384595 & BC447992)

APPEAL from judgments of the Superior Court of Los Angeles, Michelle R. Rosenblatt and William F. Fahey, Judges. Affirmed.

Law Offices of Joseph C. Markowitz and Joseph C. Markowitz; Andrade & Associates, Richard B. Andrade, Jennifer L. Gordon and Brett K. Wiseman for Defendants and Appellants.

Appell Hilaire Benardo and Barry M. Appell for Plaintiff and Respondent.

These consolidated appeals arise from two actions involving a purported settlement agreement under Code of Civil Procedure section 998. In the first action, respondent Arash Tashvighi asserted claims as an individual and as a class representative against appellants, including several claims as an individual under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.). After Tashvighi accepted appellants' offer under Code of Civil Procedure section 998 to settle his individual claims, the trial court issued him an award of attorney fees as the prevailing party under FEHA. In Tashvighi's second action against appellants for breach of the settlement agreement, the trial court granted summary judgment in Tashvighi's favor. We affirm the fee award in the first action and the judgment in the second action.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In January 2008, Tashvighi initiated the initial action (L.A. Super. Ct. Case No. BC 384595) against his former employer, appellant Rapid Plumbing, Inc. (Rapid Plumbing), and one of its managers, appellant Alvin Ramirez. Tashvighi asserted claims as an individual for discrimination, harassment, and retaliation under FEHA, as well as for wrongful termination in violation of public policy, negligent supervision, and intentional infliction of emotional distress. In addition, he asserted class action claims for violations of wage and work hour laws. The trial regarding the class action claims was bifurcated from the trial regarding the individual claims, which was set for January 25, 2010.

On January 19, 2010, appellants' counsel sent Tashvighi's counsel an offer to compromise "pursuant to Code of Civil Procedure section 998."[1] Under the offer, Tashvighi was to receive $30,000 for a dismissal of his individual claims. In addition, the parties were to execute a release agreement "consistent with" the offer after its acceptance. The offer contained no express waiver of Tashvighi's entitlement to attorney fees. On the same date, Tashvighi agreed to the offer. On January 27, 2010, Tashvighi voluntarily dismissed the individual claims.

In March 2010, Tashvighi filed a motion for an award of $68,969 in attorney fees as the prevailing party under FEHA with respect to his individual claims. The motion contended that the settlement agreement included no waiver of Tashvighi's statutory right to attorney fees, and that Tashvighi was entitled to recover the fees he had incurred in connection with all of the individual claims because they rested on the facts underlying his FEHA claims. The trial court (Judge Michelle R. Rosenblatt) denied the motion without prejudice, concluding that although Tashvighi was entitled to a fee award under FEHA, his counsel had failed to provide evidence sufficient to segregate their work related to the individual claims from their work related to the class action claims.

In September 2010, Tashvighi filed a renewed motion for an attorney fee award of $78,241.50. In addition, he sought to enforce the settlement agreement under section 664.6.[2] On October 19, 2010, the trial court entered an order

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[1] All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

[2] Under section 664.6 "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." This provision "was enacted to provide a summary procedure
(Fn. continued on next page.)

granting Tashvighi an award of $75,756.50 in attorney fees and a judgment in his favor for this amount, but denied Tashvighi's motion under section 646.6 to enforce the settlement agreement. Appellants noticed an appeal from the fee order and judgment (B229037).

On October 22, 2010, Tashvighi filed his second action against appellants (L.A. Super. Ct. Case No. BC 447992), which was assigned to Judge William F. Fahey. Tashvighi's complaint, which contained a single cause of action for breach of contract, alleged that appellants refused to pay the $30,000 owed to him under the settlement agreement, even though he had performed under the agreement. The complaint sought $30,000 in damages.

In April 2011, Tashvighi filed a motion for summary judgment or, in the alternative, summary adjudication of issues. Following a hearing, the trial court granted the motion for summary judgment. On July 25, 2011, the court entered judgment in Tashvighi's favor and against appellants for $30,000. Appellants noticed an appeal from the judgment (B235181). On February 24, 2012, at appellants' request, we ordered the appeals consolidated.

DISCUSSION

Appellants present overlapping contentions in their appeals. Regarding the fee order and judgment in the first action, appellants maintain that the trial court lacked authority to determine the enforceability of the section 998 settlement agreement prior to the resolution of the second action. They further contend that the section 998 offer incorporated a fee waiver provision, that no enforceable

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for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.)

agreement resulted from the offer, that their counsel was without authority to enter into an agreement lacking a fee waiver, and that Tashvighi was not the prevailing party for purposes of a fee award under FEHA. Regarding the grant of summary judgment in the second action, appellants contend there are triable issues whether the offer resulted in an enforceable agreement, including whether the agreement is invalid due to misrepresentations by Tashvighi's counsel and their counsel's lack of authority to enter into the agreement.

A. *Section 998*

We begin by examining section 998, which "encourage[s] settlement of disputes through a straightforward and expedited procedure." (*Bias v.Wright* (2002) 103 Cal.App.4th 811, 819 (*Bias*).) Subdivision (b)(1) of the statute provides that "upon receipt of an offer and proof of acceptance, the clerk or the court should perform the ministerial task of entering judgment according to the parties' agreement."[3] (*Bias, supra*, at p. 819.) Furthermore, subdivisions (b) through (e) of section 998 "establish[] a procedure for shifting the costs upon a party's refusal to settle. If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own postoffer costs and, moreover, must pay its opponent's postoffer costs . . . ." (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 798 (*Barella*).)

Our Supreme Court has stated: "That policy [behind section 998] is plain. It is to encourage settlement by providing a strong financial disincentive to a party

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3 Subdivision (b)(1) of section 998 states: "If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly."

-- whether it be a plaintiff or a defendant -- who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer. (This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.)" (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

To the extent section 998 is silent regarding the form of an offer or its acceptance, general contract law principles apply, provided they "neither conflict with the statute nor defeat its purpose." (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280.) Nonetheless, with respect to the application of such principles, our Supreme Court has favored the adoption of "bright line rule[s]" that promote the legislative purposes of section 998. (*Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 272.)

In view of the language and goals of section 998, offers are subject to several rules. The terms of the offer must be sufficiently clear and specific, as the offeree is entitled to a meaningful opportunity to assess the value of the offer before accepting or rejecting it, and section 998 accords the trial court no authority to adjudicate disputes regarding the terms of a settlement before judgment is entered. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 726-727 (*Berg*).) Thus, when a section 998 offer is silent regarding attorney fees, a prevailing party is ordinarily entitled to a fee award if authorized by statute or contract. (*Engle v. Copenbarger & Copenbarger, LLP* (2007) 157 Cal.App.4th 165, 168 (*Engle*).) Although an offer may include nonmonetary components, such items prevent application of section 998 if they make the offer's overall value impossible to discern. (*Barella, supra*, 84 Cal.App.4th at pp. 800-803.) Furthermore, a section 998 offer may properly request a dismissal of the adverse party's claims with prejudice rather than the entry of judgment, as a dismissal with prejudice is

functionally equivalent to a judgment. (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1055-1056; *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 905-906 (*Goodstein*).)

B. *Fee Order and Judgment in First Action*

We turn to appellants' challenges to the October 19, 2010 fee award and judgment in the first action. "In actions under . . . FEHA, the court, in its discretion, may award reasonable attorney fees to the prevailing party. (Gov. Code, § 12965, subd. (b).)" (*Young v. Exxon Mobil Corp.* (2008) 168 Cal.App.4th 1467, 1474.) Generally, "in exercising its discretion, a trial court should . . . award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust." (*Ibid*.) Under this standard of review, to the extent the fee rulings implicate factual determinations, whether express or implied, "[t]he trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice." (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545.) In contrast, to the extent the fee rulings rely on the resolution of questions of law, we review the rulings de novo. (*Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431.)

1. *Underlying Proceedings*

Before the trial court, Tashvighi maintained that the section 998 offer's silence regarding fees permitted him to seek a fee award, and that the terms of the offer rendered him the prevailing party under FEHA. He argued that he had achieved a favorable settlement that resulted in a net monetary recovery, and that no special circumstances rendered the fee award unjust.

Tashvighi supported his fee requests with declarations from his counsel, Barry M. Appell, regarding the events culminating in the purported section 998 settlement. According to Appell, on January 8, 2010, the parties unsuccessfully attempted to resolve the action at a mandatory settlement conference. During the conference, Appell stated that Tashvighi's economic damages were approximately $12,000 to $15,000. Tashvighi's final demand was for $50,000, but appellants' offers did not exceed $25,000.

On January 15, 2010, appellants presented a section 998 offer signed by their counsel, Jennifer L. Patigler-Gordon (Gordon).[4] In pertinent part, the offer stated: "[Rapid Plumbing] hereby offers to have a judgment entered for [Tashvighi] in the sum amount of $25,000.00. If this [o]ffer to [c]ompromise is accepted, Tashvighi will dismiss this action as to all parties upon entry of judgment and payment of all sums owed to Tashvighi consistent with this [o]ffer to [c]ompromise." The offer contained no provision regarding costs or attorney fees.

On January 19, 2010, Appell and Gordon exchanged several e-mails concerning the offer. Appell advised Gordon that Tashvighi would not dismiss his entire action, and asked whether appellants might offer $30,000. Gordon informed Appell that her colleague was consulting with appellants, and then stated: "Rapid has agreed to settle the matter (individual claims only) for $30,000.00[.] [H]owever[,] Rapid requests that said settlement be made confidential prohibiting your client from disclosing the terms and condition[s] (including amount) to

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[4] We refer to appellants' counsel as Gordon, as she signed the section 998 offer using this name.

anyone (except as required by law). [¶] Congrats . . . I believe we have settled this matter."

In response, Appell sent the following e-mail: "Please send me a new [section] 998 offer to this effect. Rather than a judgment, you can make it a settlement. And then I will go to [Tashvighi] with it like we discussed. [¶] It should also include . . . Ramirez rather than just Rapid [Plumbing,] too. Otherwise, we are still proceeding to trial against Ramirez. [¶] Here's some language that should work for the [section] 998 [offer] that I took from [the] Rutter [G]roup and modified: [¶] 'Pursuant to . . . section 998, [appellants] hereby offer to pay [Tashvighi] the sum amount of $30,000.00 in exchange for a dismissal of his individual claims against [appellants] only. This offer is not intended to prevent [Tashvighi] from continuing to pursue his class action claims . . . . If this offer is accepted, the parties will execute a release agreement consistent with this [s]ection 998 [o]ffer . . . .' [¶] Then you . . . prepare an appropriate release agreement with a confidentiality provision."

On January 19, 2010, appellants served the offer pertinent here, which contained the precise terms proposed by Appell, and otherwise made no reference to costs or attorney fees.[5] On the same date, Appell executed a written acceptance of the offer on Tashvighi's behalf. Two days later, on January 21, 2010, Appell filed notices of the offer and settlement.

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[5] The offer stated in pertinent part: "Pursuant to . . . section 998, [appellants] hereby offer to pay [Tashvighi] the sum amount of $30,000.00 in exchange for a dismissal of his individual claims against [appellants] only. This offer is not intended to prevent [Tashvighi] from continuing to pursue his class action claims . . . . If this offer is accepted, the parties will execute a release agreement consistent with this [s]ection 998 [o]ffer to [c]ompromise."

According to Appell, Gordon never suggested that she intended the offer to include a waiver of Tashvighi's claims for attorney fees until January 26, 2010, when Gordon sent Appell a draft release agreement that included an attorney fee waiver. Appell further stated that he did not review the draft agreement for two weeks because he was preparing for trial in an unrelated matter. On January 27, 2010, Appell filed Tashvighi's voluntary dismissal of his individual claims, which the court clerk entered. Later, when Appell reviewed the draft agreement, he concluded that the fee waiver fell outside of the offer, and thus did not "follow up with [Gordon]" regarding the draft agreement.

Appellants opposed the fee requests on numerous grounds, including that the offer was ineffective due to uncertainty regarding its terms, that appellants' counsel lacked authority to settle Tashvighi's claims for an amount exceeding $30,000, that the offer included an attorney fee waiver, and that Tashvighi was not the prevailing party on his individual claims. Their oppositions relied on declarations from Gordon and Brian Pullan, the owner of Rapid Plumbing.

Gordon's account of the events surrounding Tashvighi's acceptance of the January 19, 2010 section 998 offer differed from Appell's declarations. Gordon stated that during the settlement negotiations on January 19, 2010, she phoned Appell, in addition to exchanging the e-mails described in Appell's declarations. According to Gordon, her call occurred after she informed Appell by e-mail that appellants were prepared to settle the matter for $30,000 and a confidentiality agreement, but before Appell sent his e-mail suggesting the terms for the section 998 offer. Regarding the conversation, Gordon stated: "I called . . . Appell to discuss the settlement offer . . . and [said] that this was a last settlement offer by

the defendants and was all inclusive and that I would prepare the Settlement Agreement."[6]

Pullan stated that he approved the settlement offer of $30,000, but required a confidentiality agreement as an element of the settlement. According to Pullan, his decision was based on his counsel's advice that appellants would incur from $6,000 to $7,000 in expenses per day during a trial, resulting in expenses exceeding $49,000 for a seven-day trial. He further stated: "[T]he $30,000 represented the total and final settlement offer. No more money was on the table and Rapid Plumbing was not willing to pay any monies over $30,000."

Relying on these declarations, appellants maintained that Appell knew that they sought a fee waiver in the offer. In addition, appellants contended that Tashvighi was not the prevailing party because his settlement represented only the "nuisance value" of his claims, as the settlement recovered less than his projected expenses for a seven- to ten-day trial.

In determining that Tashvighi was entitled to a fee award, the trial court rejected appellants' challenges to the settlement agreement. The court stated that because the section 998 offer contained no reference to a fee waiver or confidentiality provision, appellants "cannot now claim that the agreement . . . included a release of all claims, including [for] attorney[] fees, and . . . a confidentiality clause." The court further concluded that Tashvighi was the

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6 Gordon also provided a somewhat different account of Tashvighi's and Appell's objectives regarding the litigation and settlement. She asserted that during the January 8, 2010 mandatory settlement conference, Appell made a proposal to settle the matter for $35,000. In addition, she maintained that at some point after the initiation of the action, Appell told her that Tashvighi sought $30,000 to $50,000 in emotional damages, and that during the settlement negotiations, Appell said that "he needed to recoup some of his costs."

prevailing party because his recovery under the settlement exceeded his "actual damages."

2. *Scope of Appeal from Fee Rulings*

At the threshold of our inquiry into appellants' challenges on appeal, we address Tashvighi's contention regarding the proper scope of our review. He maintains that although appellants have noticed their appeal from the October 19, 2010 fee rulings, their appeal is effectively an attack on the voluntary dismissal of his individual claims on January 27, 2010, and the underlying settlement. He argues that any such challenge to the dismissal contravenes the principle that ordinarily "a party cannot appeal from a judgment to which the party has stipulated as part of a settlement . . . ." (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 666-669 (*Pazderka*).) In addition, he also argues that appellants may not challenge the settlement because appellants never sought to vacate the dismissal or agreement under section 473. We reject these contentions. In attacking the fee rulings, appellants have challenged the settlement underlying the dismissal, but have never suggested that they seek to have the dismissal set aside. As explained below, because the fee rulings are appealable, we may examine appellant's challenges to the settlement in reviewing the fee rulings, even though the dismissal was entered pursuant to the agreement and appellants never attacked the settlement through section 473.

Unlike the dismissal, the fee rulings are appealable. Because the dismissal did not resolve Tashvighi's class action claims against appellants, it is not a final judgment for purposes of an appeal (see *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 806); moreover, as explained below, section 998 judgments are not directly appealable (*Pazderka*, *supra*, 62 Cal.App.4th at p. 667). However, even

when no final judgment has been entered in an action, a party may properly appeal a final ruling on a collateral matter, that is, a ruling that directs the "payment of money or performance of an act" and is "dispositive of the rights of the parties" with respect to the collateral matter. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.) Here, the fee rulings are final regarding Tashvighi's entitlement to attorney fees with respect to the dismissed claims. (*San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.* (2002) 95 Cal.App.4th 1400, 1402-1403, fn. 1 [order directing party to share pre-trial case management costs for certain tests was final and separately appealable, though party's ultimate share of the costs not fixed at the time of the order].)

Because the fee rulings are properly subject to an appeal, we may examine appellants' challenges to the settlement insofar as the challenges are related to the fee rulings, despite the absence of a section 473 motion. Under section 906, an appellate court is authorized to review "*any* intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from." (Italics added.) Because the dismissal provided the basis for Tashvighi's fee request, the settlements fall within our review of the fee rulings, as appellants challenged the settlement in opposing the fee request. (See *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1331-1332 [discovery ruling preceding order denying class certification was properly before appellate court because ruling necessarily affected order].)

Furthermore, the fact that the dismissal was entered as the result of a settlement does not bar us from examining appellants' challenges to the settlement, insofar as the challenges are related to the fee rulings. Even when parties waive their right to take a direct appeal from a judgment entered pursuant to a settlement, they do not thereby waive their right to appeal from post-judgment

rulings regarding the enforcement of the judgment. (See *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359 [although parties expressly waived their rights to appeal judgment taken pursuant to a stipulation, their waiver did not bar an appeal for a postjudgment ruling that the stipulation authorized the judgment].) As appellants attacked the settlement's validity in opposing Tashvighi's fee request before the trial court, they may reassert their challenges on appeal.

Pazderka, upon which Tashvighi relies, is factually distinguishable. There, the defendant made a section 998 offer to pay $15,000 regarding the plaintiffs' complaint and to take nothing on the defendant's cross-complaint. (*Pazderka*, *supra*, 62 Cal.App.4th at pp. 663-664.) The plaintiffs accepted the offer, and the clerk entered a judgment pursuant to section 998. (*Ibid.*) After the defendant noticed an appeal from the judgment, the trial court issued an order granting the defendant's motion under section 473 to vacate the judgment, from which the plaintiffs appealed. (*Pazderka*, *supra*, at pp. 664-665.) On appeal, the plaintiffs contended the defendant's notice of appeal removed the trial court's jurisdiction to rule on the section 473 motion. (*Pazderka*, at pp. 665-669.) In rejecting the contention, the appellate court concluded that section 998 judgments are not directly appealable because they are entered through ministerial action, which creates no record sufficient for appellate review. (*Pazderka*, at p. 667.) The court further stated that if a party intends to challenge a section 998 judgment on appeal, the appropriate procedure is to file a motion under section 473 to vacate the judgment, as this will ordinarily result in an appealable order and an adequate appellate record. (*Pazderka*, at pp. 667-669.)

Here, unlike the defendant in *Pazderka*, appellants never noticed an appeal from the dismissal, and do not suggest that the dismissal itself should be vacated.

They have noticed appeals only from the fee rulings in the first action and the $30,000 judgment in the second action. Furthermore, as explained above, their challenges to the settlement fall within the scope of our review of the fee rulings, notwithstanding appellants' failure to attack the settlement through section 473. As the fee rulings are appealable and are accompanied by an adequate record, appellants' challenges to the settlement are subject to our review.

3. *Authority to Issue Fee Award*

Appellants contend the trial court lacked authority to issue the fee rulings for two reasons. First, they argue that the court erred in ruling on Tashvighi's fee request because it was not authorized under section 998 to resolve their challenges to the settlement. Second, they contend that the denial of Tashvighi's motion under section 664.6 to enforce the settlement agreement removed the court's authority to issue the fee rulings. As explained below, they are mistaken.

Although a trial court lacks authority under section 998 to adjudicate disputes regarding the terms of a settlement *before* the entry of a section 998 judgment (*Berg*, *supra*, 120 Cal.App.4th at p. 727), the court may resolve such disputes after the entry of judgment. In *Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 625-630 (*Roden*), an employer made a section 998 offer to resolve an action against it by a former employee. (*Roden, supra*, at pp. 625-630.) After the employee accepted the offer but before judgment was entered pursuant to the offer, a dispute arose regarding the compensation granted the employee under the offer. (*Id*. at. 630.) The trial court entered judgment in accordance with the offer, and deferred the resolution of the dispute to post-judgment motions. (*Id*. at pp. 629-630.) The appellate court noted that this procedure complied with section 998. (*Roden*, at p. 630, fn. 3.) The same is true of the procedure followed in the

instant case, as the trial court resolved appellants' challenges to the section 998 settlement only after the clerk entered Tashvighi's voluntary dismissal.[7]

Furthermore, the denial of Tashvighi's section 664.6 motion did not remove the trial court's authority to issue the fee rulings. On this matter, appellants argue that the fee rulings improperly created a risk of inconsistent judgments, as the denial compelled Tashvighi to initiate a second action to enforce the agreement. We disagree.[8]

Generally, when a second action is filed in the superior court of a county in which a superior court action already exists regarding the same subject, the existence of the two actions does not remove jurisdiction from the judges conducting the actions to rule on the matters before them. (See *Colvig v. RKO General, Inc.* (1965) 232 Cal.App.2d 56, 75; 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 430, pp. 1082-1083.) To avoid inconsistent rulings, the parties must seek consolidation of the actions. (See *Colvig v. RKO General, Inc.*, *supra*, 232 Cal.App.2d at p. 75; 2 Witkin, Cal. Procedure, *supra*, § 430, pp. 1082-1083.) Here, Tashvighi's second action was filed only *after* Judge Rosenblatt entered the fee rulings in the first action. As the second action did not exist when

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7 Appellants' reliance on *Bias*, *supra*, 103 Cal.App.4th 811 and *Saba v. Crater* (1998) 62 Cal.App.4th 150 is misplaced. In each case, the trial court improperly adjudicated a dispute regarding terms of a section 998 offer or acceptance before entering judgment in accordance with its resolution of the dispute. (*Bias*, *supra*, at pp. 821-822; *Saba v. Crater*, *supra*, 62 Cal.App.4th at pp. 152-154.) That did not occur here.

8 We note that Tashvighi was entitled to initiate the second action despite the denial of his section 664.6 motion. This is because "[t]he statutory procedure for enforcing settlement agreements under section 664.6 is not exclusive. Thus, even when the summary procedures of section 664.6 are not available, a party can still seek to enforce a settlement agreement by, among other things, prosecuting an action for breach of contract. [Citations.]." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 306.)

the court addressed Tashvighi's fee request, the court had jurisdiction to decide the request, and thus did not err in doing so.

4. *Challenges to Section 998 Settlement Agreement*

Appellants raise several interrelated contentions regarding the interpretation and enforceability of the section 998 settlement agreement, as embodied in the offer and acceptance. At the outset, we observe that their contentions do not directly implicate the cost-shifting procedure established in section 998, as Tashvighi accepted the section 998 offer and dismissed his individual claims. Under these circumstances, we examine appellants' contentions in light of general contract law principles, with an eye to the goals of section 998. (*Ritzenthaler v. Fireside Thrift Co.* (2001) 93 Cal.App.4th 986, 989-990 (*Ritzenthaler*).) Under these principles, a section 998 agreement "is enforceable if it is sufficiently definite that a court can ascertain the parties' obligations thereunder and determine whether those obligations have been performed or breached." (*Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 268 (*Elite Show Services*).) Furthermore, in construing the section 998 agreement, we apply established rules of contract interpretation. (*Ritzenthaler*, *supra*, at pp. 989-990.)

a. *Section 998 Offer*

Appellants contend that their offer of settlement was not properly regarded as an offer to compromise under section 998. They argue that the offer fell outside section 998 because it envisaged a dismissal of Tashvighi's claims and did not state the key terms of the proposed settlement agreement. In addition, they argue that Appell and Gordon had already consummated a settlement before Gordon transmitted the offer.

Appellants' contention fails in light of the terms of offer and the circumstances under which it arose. The offer, on its face, was made pursuant to section 998. It is well established that a section 998 offer may seek a dismissal of the adverse party's claims with prejudice (see pt. A., *ante*); furthermore, as explained below (see pt. B.4.c., *post*), the offer lacked no essential terms.

Finally, nothing in the record shows that the parties entered into a settlement before Gordon transmitted the offer. Generally, the existence of a contract hinges on "[t]he manifestation of mutual consent," as disclosed by the parties' communications and conduct. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 117, pp. 156-157.) This conduct usually takes the form of an offer and an acceptance. (*Ibid*.) After Appell told Gordon that Tashvighi would not accept appellants' first section 998 offer, Appell and Gordon continued their negotiations until Gordon stated, "Congrats . . . I believe we have settled this matter." When Appell replied, "Please send me a new [section] 998 [offer] to this effect," Gordon transmitted the pertinent offer. The parties' communications and conduct thus conclusively establish their intent to consummate a settlement through the section 998 offer.

b. *Implied Fee Waiver*

Appellants contend that the section 998 offer contained a waiver of Tashvighi's entitlement to attorney fees, notwithstanding the offer's silence with respect to fees. Pointing to the offer's release provision, which requires the parties to "execute a release agreement consistent with this [s]ection 998 [o]ffer," appellants argue that the section 998 offer obliged the parties to enter into a release agreement encompassing a fee waiver. We disagree.

Numerous appellate courts have held that a section 998 offer lacking an express reference to attorney fees contains no fee waiver. (*Engle*, *supra*, 157 Cal.App.4th at pp. 168-170; *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1084; *Ritzenthaler, supra*, 93 Cal.App.4th at pp. 989-990; *Lanyi v. Goldblum* (1986) 177 Cal.App.3d 181, 192-193.) *Engle* is illustrative. There, the plaintiff accepted a section 998 offer to settle her sexual harassment action against her employer. (*Engle, supra*, at pp. 167-168.) The offer obliged the plaintiff to execute "'a release and discharge of any and all claims, of whatever nature (substantive and procedural) which the plaintiff may have against the defendants.'" (*Id*. at p. 167.) When the plaintiff sought a fee award under FEHA as the prevailing party, the trial court denied her request, reasoning that the broad release provision encompassed her entitlement to fees. (*Id*. at p. 168.) Reversing the ruling, the appellate court held that the case fell squarely within the "bright-line rule" that "a section 998 offer to compromise excludes fees only if it says so expressly." (*Engle*, at pp. 169-170.) The same is true here.

In an effort to distinguish *Engle*, appellants maintain that the offer's release provision is reduced to surplusage if the release agreement encompassed no fee waiver. They argue that "the release agreement has no intelligible purpose except to waive fees." (Italics omitted.) We reject this contention. As explained below, the release provision is reasonably regarded as requiring a release of appellants' liability insofar as it might attach to or arise from Tashvighi's individual claims in the first action.

Generally, a section 998 offer may properly oblige the parties to execute a release of the claims at issue in the underlying action. (*Linthicium v. Butterfield* (2009) 175 Cal.App.4th 259, 270; *Engle, supra*, 157 Cal.App.4th at pp. 168-170; *Goodstein*, *supra*, 27 Cal.App.4th at pp. 907-908.) In contrast, a section 998 offer

requiring a release of claims *beyond* the scope of the action is invalid, as the value of the release is impossible to determine. (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 696-701.) Under these principles, courts have enforced section 998 offers stating that the parties were to execute a "general release" of claims, as the other terms of the offer showed that the release targeted only the claims at issue in the pertinent action. (*Linthicium v. Butterfield, supra,* at pp. 270-272; *Goodstein*, *supra*, at pp. 907-908.)

In view of this authority, the release provision in the section 998 offer at issue here is reasonably construed to oblige the parties to execute a release encompassing appellants' liability regarding Tashvighi's individual claims. Aside from mandating a release, the offer required Tashvighi to dismiss "'his individual claims against [appellants] only,'" and otherwise stated: "'This offer is not intended to prevent [Tashvighi] from continuing to pursue his class action claims.'" As these terms establish that the anticipated release targeted only appellants' liability for the individual claims, the release provision in the offer was similar to the release provision at issue in *Engle.* Accordingly, under *Engle*, the release provision's silence regarding fees is fatal to appellants' contention that the anticipated release agreement included or incorporated a fee waiver.[9]

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9 In a related contention, appellants' reply brief maintains for the first time on appeal that Tashvighi cannot recover a fee award because there is an unsatisfied condition precedent to the settlement agreement, namely, the execution of the release. Appellants have forfeited this contention by failing to raise it in their opening brief. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) However, we would reject it were we to consider it on the merits.

Assuming that the execution of the release was a condition precedent to the settlement, appellants' contention fails in light of our conclusion that the settlement included no fee waiver. Generally, a party cannot escape its liability under a contract by preventing the occurrence of a condition precedent to the contract. (*Jacobs v. Tenneco*
(Fn. continued on next page.)

c. *Specificity of the Offer*

Appellants contend the section 998 offer was ineffective because it was insufficiently specific. Before the trial court and on appeal, they maintain that the offer necessarily included "additional" or "unknown" terms because the release provision anticipated the execution of a release. The crux of their argument appears to be that the section 998 offer failed to specify the key terms of the anticipated release, including a fee waiver. As explained below, we discern no material omission in the offer relevant to Tashvighi's entitlement to a fee award.

The section 998 offer's failure to detail the terms of the anticipated release does not render the offer ineffective. Although a contract that "leaves an essential element for future agreement of the parties" is ordinarily unenforceable (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 817), it is not necessary that every term be stated in a section 998 agreement (*Elite Show Services, supra*, 119 Cal.App.4th at p. 269). "'The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement.' [Citation.] In the absence of express conditions, a court may look to custom and practice to determine incidental matters, so long as such matters do not alter or vary the terms of the agreement. [Citation.]" (*Ibid*., quoting *King v. Stanley* (1948) 32 Cal.2d 584, 588, disapproved on another point in *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 351, fn. 4.) In addition, the court may rely on other extrinsic evidence to clarify the acts required under the agreement. (See *Okun, supra,* at p. 818; see *Facebook, Inc. v. Pac. Northwest Software, Inc.* (9th Cir. 2011) 640 F.3d 1034, 1038-1038

West, Inc. (1986) 186 Cal.App.3d 1413, 1418.) Here, the record establishes that Tashvighi failed to execute the draft release proposed by appellants only because it included a fee waiver never mentioned in appellants' section 998 offer. For this reason, appellants cannot avoid their obligations on the ground that Tashvighi never executed the draft release or honored its terms, including the confidentiality agreement within it.

[settlement agreement that omits some terms may be enforceable "so long as the terms it does include are sufficiently definite"].)

For purposes of interpreting or clarifying the terms of a section 998 settlement agreement, "'parol evidence is only admissible if the contract terms are ambiguous. [Citation.]' [Citation.] 'The decision whether to admit parol evidence involves a two-step process. The first is to review the proffered material regarding the parties' intent to see if the language is "reasonably susceptible" of the interpretation urged by a party. [Citation.] If that question is decided in the affirmative, the extrinsic evidence is then admitted to aid in the second step, which involves actually interpreting the contract. [Citation.]'" (*Roden, supra,* 107 Cal.App.4th at p. 624, quoting *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554.)[10]

We discern no material unknown or additional terms related to the release provision bearing on Tashvighi's entitlement to a fee award. As explained above (see pt. B.4.a., *ante*), the release provision obliged the parties to execute a release of appellants' liability regarding Tashvighi's individual claims. Furthermore, under the bright line rule regarding fee waivers, the provision's silence concerning fees is sufficient to show that the parties did not intend to include a fee waiver in the anticipated release agreement.

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10 "In reviewing the trial court's construction of the [settlement agreement] . . . several different standards of review may apply, if a party offers parol evidence to aid in interpretation. [Citation.] 'On appellate review, the trial court's threshold determination of ambiguity is a question of law [citation] and is thus subject to our independent review [citation].' [Citation.] If parol evidence is admitted and is in conflict, the substantial evidence test applies. [Citation.] 'However, when . . . the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing. [Citation.]' [Citation.]" (*Roden, supra,* 107 Cal.App.4th at pp. 624 -625.)

Nor does the extrinsic evidence show that the release provision envisaged a release containing a fee waiver. As post-acceptance communications are ordinarily irrelevant to the interpretation of a section 998 offer, we focus on the parties' pre-acceptance negotiations. (*Roden, supra,* 107 Cal.App.4th at p. 634; see *Pazderka*, *supra*, 62 Cal.App.4th at p. 672.) Here, the record is devoid of evidence that Appell and Gordon discussed a waiver. None of the pre-offer e-mails between Appell and Gordon referred to attorney fees or a waiver. When Gordon informed Appell, "Congrats . . . I believe we have settled this matter," she never mentioned a waiver as a term of the settlement. Appell denied that the parties discussed fees prior to Tashvighi's acceptance of the offer.

The sole item of evidence suggesting that Gordon may have intended the release to encompass a fee waiver is her purported remark to Appell that the proposed settlement was "all inclusive." According to Gordon, she made this remark during a phone call after she told Appell by e-mail that appellants had agreed to a settlement, but before Appell sent his e-mail proposing the terms for the section 998 offer. In issuing the fee award to Tashvighi, the trial court impliedly declined to credit Gordon's description of her phone call. Ordinarily, we review such findings for the existence of substantial evidence. (*Roden, supra*, 107 Cal.App.4th at pp. 624-625.) However, as explained below, Gordon's remark would not support appellants' proposed interpretation of the release provision even if she made the remark.

Generally, extrinsic evidence regarding the meaning of a release is assessed under "the usual objective standard of contract interpretation." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 351.) Under this standard, the import of a party's remark during negotiations is judged by reference to a "reasonable person" test, namely, how a reasonable person in the party's shoes would have believed the

remark's auditor to have understood the remark. (*Ibid*.) The party's subjective understanding of his or her own remark is thus irrelevant. (*Ibid*.) The application of the test presents only a question of law when there are no pertinent conflicts in the extrinsic evidence. (*Ibid*.)

Here, Gordon's remark, viewed in context, cannot reasonably be viewed as successful in communicating a demand for a fee waiver. As noted above, the parties never discussed fees prior to Gordon's phone call. The remark itself is vague and ambiguous, as it is plausibly understood to convey only a desire for a general release regarding liability for Tashvighi's individual claims. However, when Appell's e-mail proposed a release of this type but made no reference to attorney fees, Gordon never clarified that the release was also to include a fee waiver. Under these circumstances, a reasonable person would not conclude that the remark had instilled in Appell the belief that appellants sought a fee waiver.

Appellants also contend that the section 998 offer was ineffective because it contained no reference to a confidentiality agreement. They are mistaken. We recognize that the parties appear to agree on appeal that Gordon and Appell anticipated that the release would include a confidentiality agreement, notwithstanding the trial court's determination that the offer's release provision encompassed no such an agreement. On this matter, the parties point to Appell's e-mail to Gordon proposing terms for the section 998 offer, which discloses Appell's willingness to accept a release incorporating a confidentiality agreement.

Nonetheless, even if the trial court erred in ruling that the release provision incorporated no requirement for a confidentiality agreement, the error is irrelevant to whether the section 998 offer was enforceable. Tashvighi has never suggested that he would have rejected the offer had it expressly required him to sign such an agreement, or that he would have refused to sign a release containing a

confidentiality provision. Appell's declaration states only that the draft release proposed by Gordon was not executed because it contained a fee waiver. Under these circumstances, the section 998 offer cannot be regarded as unenforceable simply because it lacked a reference to a confidentiality agreement. In sum, the offer was sufficiently specific to be effective.[11]

d. *Timeliness of Offer*

Appellants contend the section 998 offer was untimely. Subdivision (b) of the statute provides that "[n]ot less than 10 days prior to commencement of trial . . . , any party may serve an offer in writing upon any other party to the action to allow judgment to be taken . . . in accordance with the terms and conditions stated at that time." Appellants thus argue that the offer was ineffective because it was served on January 19, 2010, less than ten days before the date set for trial, namely January 25, 2010. We reject this contention.[12]

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11 In a related contention, appellants suggest that the implied requirement for a confidentiality agreement in the section 998 offer rendered the offer invalid. Pointing to *Barella, supra*, 84 Cal.App.4th 793, they argue that the value of the confidentiality agreement was impossible to assess. We disagree. In *Barella*, the appellate court held that in defamation actions, section 998 offers requiring the plaintiff to enter into a confidentiality agreement are ineffective. (*Barella*, *supra*, at pp. 801-803.) The court reasoned that because plaintiffs in defamation actions seek public vindication whose value to them is "highly subjective," the loss of such vindication through a confidentiality agreement cannot be determined, for purposes of the cost-shifting procedure under section 998. (*Ibid*.) Here, Tashvighi asserted no defamation claim, and appellants have identified no evidence that he placed any value on public vindication.

12 Respondents maintain that appellants have forfeited this contention by failing to raise it before the trial court. Because the contention raises a pure question of law on undisputed facts, we decline to find a forfeiture. (*Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1433.)

As no published decision has addressed whether a section 998 offer that has been accepted is untimely if served less than 10 days before the date set for trial, we confront a question of statutory interpretation. "The objective of statutory interpretation is to ascertain and effectuate legislative intent." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.) In seeking this intent, we look for an interpretation of the pertinent portion of subdivision (b) that respects its language, harmonizes it with the other provisions of section 998, and promotes the goals of the statute. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387, 1390-1391.)

In our view, conclusive evidence regarding the legislative intent is found in subdivision (b)(3) of section 998, which states: "For purposes of this subdivision, a trial . . . shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence." This provision, by its plain language, functions as a definition. Generally, "[t]erms defined by the statute in which they are found will be presumed to have been used in the sense of the definition." (*Faulder v. Mendocino County Bd. of Supervisors* (2006) 144 Cal.App.4th 1362, 1371-1372.) Because subdivision (b)(3) refers to the "*actual* commence[ment]" of trial and omits the date set for trial, we hold the 10-day limit in subdivision (b) is triggered only when the pre-trial offer is *not* accepted, as only in such cases is there an actual commencement of trial.

This construction facilitates the policy underlying section 998, namely, the promotion of settlements. As explained above (see pt. A., *ante*), a party who declines to accept a section 998 offer is potentially subject to the cost-shifting defined in the statute. The 10-day period established in subdivision (b)(3) of

section 998 thus ensures that any party who declines to accept an offer has had an opportunity to consider it before trial.[13] In contrast, when a party accepts the offer, subdivision (b)(1) of the statute provides only that judgment must be entered as a ministerial act pursuant to the settlement. (*Bias, supra,* 103 Cal.App.4th at p. 819.) Applying the 10-day limit to an accepted offer would thus have the effect of barring a judgment to which *both parties agreed*, in contravention of the policy underlying the statute.

Lecuyer v. Sunset Trails Apts. (2004) 120 Cal.App.4th 920 (*Lecuyer*), upon which appellants rely, is inapposite. There, the defendant served a section 998 offer by mail on the plaintiff, who did not accept it. (*Lecuyer, supra,* at p. 922.) The jury trial on the plaintiff's claims commenced 13 days after the offer's date of service. (*Id*. at p. 924.) The appellate court held that the offer was ineffective for purposes of triggering the cost-shifting provisions of section 998, reasoning that the offer was untimely because the 10-day limit in section 998 was extended by 5 days under section 1013, subdivision (a), which governs notices served by mail.[14] (*Lecuyer, supra,* at p. 926.) As *Lecuyer* addressed only the application of the 10-

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13 Generally, the statute accords parties up to 30 days to consider the offer, absent special circumstances. Subdivision (b)(2) of section 998 states: "If the offer is not accepted prior to trial . . . or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial . . . ." As our Supreme Court has explained, the offer ordinarily remains open during the 30-day period unless the offeror revokes it. (*T. M. Cobb Co. v. Superior Court, supra,* 36 Cal.3d at pp. 277-283.)

14 Subdivision (a) of section 1013 provides: "In case of service by mail, . . . [s]ervice is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, *shall be extended five calendar days*, upon service by mail, if the place of address and the place of mailing is within the State of California . . . ." (Italics added.)

day limit when an offer is not accepted, it provides no guidance regarding the limit's application when an offer is accepted. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 ["Obviously, cases are not authority for propositions not considered therein. [Citations.]"].) In sum, the section 998 offer was not untimely.

e. *Authority of Counsel*

Appellants contend the section 998 offer was ineffective because, as set forth in Gordon's and Pullan's declarations, Gordon had no authority to offer a settlement that obliged them to pay more than $30,000.[15] As explained below, this contention fails, as appellants have never sought relief from the settlement through section 473 or any other means, and have offered no basis for such relief.

Generally, "the attorney-client relationship, insofar as it concerns the authority of the attorney to bind his client by agreement or stipulation, is governed by the principles of agency." (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403.) The relationship authorizes an attorney to bind his or her client regarding procedural or tactical matters without the client's express consent, but does not permit the attorney to enter into agreements or stipulations that "'impair the client's substantial rights,'" including agreements that "'increase . . . the amount of the judgment against his client.'" (*Id*. at pp. 404-405, quoting *Linsk v. Linsk* (1969) 70 Cal.2d 272, 276.)

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[15] The agreement did not, by its terms, oblige appellants to pay more than $30,000 to settle the case. In the absence of a fee waiver, however, appellants were at risk of being held liable for Tashvighi's attorney fees should he seek such fees and be deemed the prevailing party. Accordingly, appellants' claim goes less to Gordon's authority to settle the case than to her failure to insulate them from the collateral consequences of a settlement they authorized.

Nonetheless, clients do not invariably escape their obligations under unauthorized agreements, even though the agreements involve subjects other than procedural or tactical matters. (*In re Marriage of Helsel* (1988) 198 Cal.App.3d 332, 339.) In such cases, the clients retain a viable remedy against the lawyer in the form of a malpractice action. (*Ibid*.) Thus, for example, clients are bound by unauthorized settlement agreements if they ratify the agreement (*Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698, 703-704) or confer ostensible settlement authority on their counsel by some representation to the other parties to the agreement (*Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 549).

Here, appellants contend that although Gordon was authorized to settle the action for $30,000 and other conditions, she lacked the specific authority to enter into a settlement entitling Tashvighi to seek payments exceeding $30,000, including an award of attorney fees. On this matter, appellants have never suggested that Gordon deliberately strayed beyond her authority in arranging the settlement. Before the trial court, they maintained that she believed that the section 998 offer, in fact, included a fee waiver. Rather, they argued that Appell intended to "defraud[] [them] to extract more funds" by suggesting the terms incorporated in the pertinent section 998 offer. (Italics omitted.) According to appellants, Appell was aware that appellants sought a fee waiver, and proposed the waiver-free language to Gordon -- later incorporated in the section 998 offer -- with the knowledge that Gordon believed the language to include a waiver. Accordingly, appellants' contention that Gordon exceeded her authority relies on theories of fraud and so-called "unilateral mistake": either Appell deceived Gordon, or he "had reason to suspect that a mistake had been made" (see *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 280).

As our Supreme Court explained long ago, when a party asserts that a fee waiver was omitted from a settlement agreement due to fraud or mistake, the party "should . . . ask[] to have [the agreement] set aside." (*Rapp v. Spring Valley Gold Co*. (1888) 74 Cal. 532, 535.) The appropriate means of attacking a section 998 settlement agreement involving a party's voluntary dismissal of its claims is a motion under section 473. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*).) Under the discretionary provisions of section 473, subdivision (b) the trial court may, " upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."[16]

Section 473 permits a party to obtain relief when the pertinent ruling is the product of fraudulent or deceptive conduct by the opposing party. (*Sampanes v. Chazes* (1921) 54 Cal.App. 612, 612-613; see *Don v. Cruz* (1982) 131 Cal.App.3d 695, 702, fn. 2 ["It is sometimes said that fraud is a proper ground for relief under section 473 even though not mentioned in that section. [Citations.] To the extent that fraud has influenced the moving partys' conduct, it is simply an explanation for the moving party's mistake or excusable neglect."]).[17] Also relevant to relief

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16 Under the separate mandatory provisions of section 473, subdivision (b), the court must vacate a "default judgment or dismissal" resulting from an attorney's "mistake, inadvertence, surprise, or neglect" in defined circumstances, upon the submission of a declaration from the attorney regarding the error. These provisions are inapplicable here, as they do not encompass a voluntary dismissal pursuant to a settlement. (*Huens v. Tatum* (1997) 52 Cal.App.4th 259, 264, disapproved on another ground in *Zamora, supra*, 28 Cal.4th at pp. 256-257.)

17 Independently of section 473, a party may seek relief from a dismissal in equity on the grounds of "'extrinsic'" mistake or fraud. (*Zamora, supra,* 28 Cal.4th at p. 260.) Here, appellants have never suggested the settlement agreement is the product of extrinsic mistake or fraud. "The 'essential characteristic' of extrinsic fraud 'is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in

(Fn. continued on next page.)

from a ruling entered through an agreement or stipulation is the attorney's lack of authority to accept the agreement or stipulation. (*Zamora*, *supra*, 28 Cal.4th at pp. 259-260; *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1235.)

Generally, "a threshold requirement for relief [under section 473] is the moving party's diligence." (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420.) Here, appellants have never attempted to vacate the settlement or Tashvighi's dismissal under section 473 or in any other manner; in the first action, as in the second, appellants have challenged only their obligations under the settlement agreement. Because Pullan's declaration shows that Tashvighi's dismissal saved appellants as much as $49,000 in defense costs, they have attacked their obligations under the settlement while retaining its benefits.

Nor have appellants presented an adequate basis for relief under section 473 on the basis of fraud or mistake. "In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error.'" [Citation.] "In other words, the discretionary relief provision of section 473 only permits relief from attorney error "fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.]" "'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.]" (*Zamora*, *supra*, 28

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ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' [Citation.] Extrinsic mistake is 'a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. [Citations.]' [Citation.]" (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1044.)

Cal.4th at p. 258.) Applying this standard, our Supreme Court has concluded that when a legal assistant's typing error resulted in a section 998 offer proposing a judgment against -- rather than in favor of -- the assistant's client, contrary to the client's and the supervising attorney's instructions, the clerical error constituted an excusable mistake. (*Zamora*, *supra*, at p. 259.) In contrast, other courts have held that an attorney's negligent failure to include a fee waiver in a section 998 offer, despite his intent to do so, does not support relief under section 473. (*Pazerdka, supra*, 62 Cal.App.4th at pp. 671-672; *Premium Commercial Services Corp. v. National Bank of California* (1999) 72 Cal.App.4th 1493, 1497.)

Appellants' showing before the trial court discloses no grounds for relief under section 473 due to fraud or mistake. As explained above (see pt. B.3.c., *ante*), there is no evidence that Appell knew that Gordon or appellants intended the section 998 offer to include a fee waiver. Rather, the record shows only that Gordon mistakenly believed that the section 998 offer included an implied fee waiver, contrary to the established bright line rule that such offers must contain express waivers. "Although an honest mistake of law is a valid ground for relief [under section 473] where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief." (*A & S Air Conditioning v. John J. Moore Co.* (1960) 184 Cal.App.2d 617, 620.) Such a finding is compelled here.[18]

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18 We recognize that under section 473, relief from an "unconscionable" section 998 settlement agreement may be available to a party under a theory of unilateral mistake, even though the adverse party was unaware of the party's mistake regarding the agreement. (See *Zamora*, *supra*, 28 Cal.4th at pp. 260-261.) However, the settlement agreement here cannot be regarded as unconscionable due to the omission of a fee waiver, as courts have repeatedly enforced such agreements (see pt. B.4.b., *ante*).

We conclude that appellants are bound by the settlement agreement, even if their intention in authorizing Gordon to settle Tashvighi's individual claims for $30,000 was to limit their liability to that amount. Ordinarily, a party is required to pay fees under a section 998 settlement agreement that lacks a fee waiver due to the party's "failure to draft [the agreement] with precision." (See *Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 264.) Here, Gordon's failure to include the fee waiver was not a mere clerical error, but a legal error for which relief is properly denied under section 473.

Furthermore, Tashvighi has dismissed his individual claims with prejudice. Pointing to cases in which a party has enjoyed the benefits of an improperly authorized settlement while repudiating its burdens, our Supreme Court has stated that such an agreement may bind a party when the party "has received the advantage for which he entered into it, or the other party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the [agreement] was invalid." (*Smith v. Whittier* (1892) 95 Cal. 279, 288.) Permitting appellants to avoid the fee award while they enjoy the dismissal's benefits would produce an inequitable result of this type.[19]

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19 Appellants suggest that Tashvighi assumed the risk of prejudice from the dismissal because Appell did not adequately ascertain whether Gordon was authorized to settle the matter in the absence of a fee waiver. (See *Blanton v. Womancare, Inc.*, *supra*, 38 Cal.3d at p. 406 [party engaged in settlement negotiations "'must ascertain at his peril whether the attorney has authority to make the settlement,'" quoting *Precious v. O'Rourke* (1930) 270 Mass. 305 [170 N.E. 110, 111].) However, the record establishes that Appell reasonably believed that Gordon was authorized to offer the terms contained in the section 998 offer. The e-mail communications between the attorneys disclose that shortly after Gordon stated that a colleague was seeking settlement authority from appellants, Gordon told Appell that appellants offered $30,000 to settle the matter, but requested a confidentiality agreement. As Appell had no duty to advise Gordon that fee waivers in section 998 offers must be express (*Pazderka*, *supra*, 62 Cal.App.4th at p. 672), he was

(Fn. continued on next page.)

Pointing to *Burns v. McCain* (1930) 107 Cal.App. 291 (*Burns*), appellants contend that the fact that the section 998 offer contravened their settlement instructions, taken by itself, is sufficient to discharge them from their obligations under the settlement. We disagree. In *Burns*, the defendant authorized her attorney to settle her action, but required that any settlement agreement contain a specified term. (*Id*. at pp. 293-294.) Contrary to the defendant's instructions, her attorney entered into an agreement lacking the term, and the action was dismissed. (*Ibid.*) When the defendant discovered the error, she sought relief from the dismissal, which the trial court granted. (*Ibid*.) In affirming the relief, the appellate court noted that the defendant promptly attempted to set aside the agreement upon discovering that it lacked the required term, and that the plaintiff suffered no prejudice from the relief. As explained above, these circumstances are not present here. In sum, the section 998 offer was not ineffective simply because the legal effect of their counsel's failure to include a fee waiver was to expose appellants to potential liability above the $30,000 they offered to settle Tashvighi's individual claims.

5. *Prevailing Party*

Appellants contend the trial court erred in determining that Tashvighi was the prevailing party for purposes of a fee award under FEHA. We disagree.

Because FEHA does not define the term "prevailing party," we look to the definition that California courts have generally applied to fee award statutes containing no legislative direction regarding the term. Under this definition,

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not obliged to ask whether Gordon's silence regarding a fee waiver accurately reflected her settlement authority; moreover, as explained above (see pt. B.4.c., *supra*), he had no reason to believe that appellants sought a waiver.

"prevailing party status should be determined by the trial court based on an evaluation of whether a party prevailed '"on a practical level,"' and the trial court's decision should be affirmed on appeal absent an abuse of discretion. [Citations.]" (*Donner Management Co. v. Schaffer* (2006) 142 Cal.App.4th 1296, 1310.) In applying this standard, the trial court must identify the prevailing party "by analyzing the extent to which each party has realized its litigation objectives." (*Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1023.) The standard permits the trial court, in suitable circumstances, to accord prevailing party status to a party that voluntarily dismissed its claims. (*Donner Management Co. v. Schaffer*, *supra*, at p. 1310.)

Applying the "practical level" standard, the trial court in the first action concluded that Tashvighi was the prevailing party because his $30,000 recovery under the settlement exceeded his "actual damages." We see no abuse of discretion in this determination. According to the declarations from Appell and Gordon, Tashvighi sought approximately $12,000 to $15,000 in economic damages, and an additional $30,000 to $50,000 in emotional damages. Tashvighi thus recovered a sum greater than his alleged economic damages. (See *Engle*, *supra*, 157 Cal.App.4th at pp. 170-171 [plaintiff who recovered $35,000 in settling her FEHA action was prevailing party for purposes of fee award].)

Appellants maintain that Tashvighi is not the prevailing party because they achieved a larger measure of their objectives than Tashvighi through the settlement. They argue that the settlement resulted in a net monetary benefit to them, as their defense expenses at trial (potentially exceeding $49,000) were greater than their $30,000 settlement offer. In contrast, they assert, Tashvighi achieved only a portion of the damages he sought.

This contention misapprehends the "'practical level'" standard, insofar as it is applied in actions resolved through a settlement. Under that standard, the trial court's fundamental task is to assess the extent to which the parties have succeeded with respect to their claims or defenses. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1017.) Accordingly, when there is a voluntary dismissal of the plaintiff's claims, the trial court examines whether the dismissal signals a vindication of the plaintiff's claims. As explained in *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107: "Since the defendant's goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant. The plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals *through a settlement* or other means . . . ." (Italics added.) Thus, the trial court may properly find that the plaintiff was the prevailing party due to a net monetary recovery from a settlement. (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 181.)

In view of these principles, the savings in trial expenses that a party achieves through a dismissal are ordinarily irrelevant to the determination of the prevailing party. This is unsurprising, as *both* parties are spared the expenses of a trial through a dismissal, regardless of the reasons for the dismissal. Rather, the trial court examines whether the plaintiff achieved its goals through a settlement or in some other manner. Under this standard, the trial court acted well within its discretion in finding that Tashvighi was the prevailing party for purposes of a fee award.

C. *Summary Judgment in the Second Action*

We next examine appellants' challenges to the grant of summary judgment in the second action. "[S]ummary judgment law in this state no longer requires a

plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own cause of action. . . . All that the plaintiff need do is to 'prove[] each element of the cause of action.' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) Once the plaintiff makes an adequate initial showing, the burden shifts to the defendant to show a triable issue of fact "as to that cause of action or a defense thereto." (§ 437c, subd. (p)(1).) As explained below, appellants have established no triable issue precluding summary judgment.[20]

Tashvighi's showing in support of the motion for summary judgment relied on evidence materially similar to his evidentiary showing supporting his fee request in the first action. In granting summary judgment, the trial court determined that the section 998 settlement agreement was valid and that appellants had breached the agreement. In addition, the court concluded that appellants had raised no triable issues regarding whether the agreement was the product of fraud or misrepresentation or whether their counsel lacked the authority to make the section 998 offer. The court also noted that appellants had never attempted to set aside the agreement under section 473.

Our review is limited to appellants' contentions on appeal. In opposing Tashvighi's motion for summary judgment before the trial court, appellants relied on many of the grounds that they advanced against Tashvighi's fee award request in the first action. Nonetheless, in examining the propriety of summary judgment,

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20 "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

we examine only those contentions raised in appellants' briefs. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.)

Appellants maintain there are triable issues regarding whether the section 998 offer represented a final offer with sufficiently specific terms, whether Appell engage in fraud or misrepresentation regarding the terms he proposed for the offer, and whether the offer is unenforceable due to Gordon's lack of authority to extend the offer. In asserting these contentions before the trial court, appellants offered the same evidence that they presented in opposition to Tashvighi's fee request. Moreover, the arguments they advance on appeal in support of the contentions are essentially identical to arguments that we have considered and rejected in connection with their appeal from the fee award (see pts. B.4.b., B.4. c. & B.4.e., *ante*). For the reasons we have explained in connection with the other appeal, even if appellants' evidence is fully credited, their contentions fail as a matter of law. Accordingly, summary judgment was properly granted in Tashvighi's favor in his action for breach of contract.

DISPOSITION

The fee award and judgment in the first action (B229037) and the judgment in the second action (B235181) are affirmed. Tashvighi is awarded his costs on appeal in both appeals.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.